91-451

No. 91-

In The

Supreme Court of the United States

October Term, 1991

Robert McKim Norris, Jr.,
Petitioner,
v.
The Alabama State Bar

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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September 18, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney who sends, by messenger rather than by mail, a truthful, non-deceptive and non-misleading written communication to a prospective client, can be disciplined for doing so without violating his First Amendment right to free commercial speech, even though neither the attorney, his messenger, nor any other representative of the attorney ever had any personal contact with the recipient of the written communication.

2. Whether the Alabama Supreme Court violated Petitioner's right to fair notice of prohibited conduct when it acknowledged that Disciplinary Rule 2-103 did not on its face prohibit the conduct with which Petitioner was charged but nonetheless suspended Petitioner's license to practice law because it found that he had violated the "purpose and spirit" of the rule while announcing that purpose and spirit for the first time in the case at bar.

3. Whether Alabama Disciplinary Rule 1-102(A)(6), which prohibits "any other conduct which adversely reflects on his (an attorney's) fitness to practice law," is so vague as to deprive Petitioner of his Due Process right to fair notice of what it actually forbids.

4. Whether the Due Process Clause of the Fourteenth Amendment requires that the discipline imposed on one attorney be approximately proportional to the discipline imposed on other attorneys in the same jurisdiction for the same or similar offenses committed under the same or similar circumstances.

All parties in the Supreme Court of Alabama are named in the caption.

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Robert McKim Norris, Jr., respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Alabama, issued on March 29, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 582 So.2d 1034 and is set out in Appendix A at pages 19-26. The Court's order denying rehearing, dated June 21, 1991, appears in Appendix C at page 31.

The order of the Disciplinary Board of the Alabama State Bar is unreported. It was entered on May 24, 1990, and appears in Appendix B at pages 29-30.

JURISDICTION OF THE SUPREME COURT

The judgment and opinion of the Supreme Court of Alabama were issued on March 29, 1991. On June 21, 1991, that Court denied a timely petition for rehearing.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. This petition is timely filed on September 18, 1991, which is the 89th day after rehearing was denied by the lower court. Rule 13.1 of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED IN THIS CASE

The First Amendment to the United States Constitution states, in pertinent part, that

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution states, in pertinent part, that

> . . . Nor shall any State deprive any person of life, liberty or property, without due process of law. . .

Temporary Disciplinary Rule 2-102(A) of the Supreme Court of Alabama states:

> Subject to the requirements of Temporary DR 2-101, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor displays, radio, television, or written communication not involving solicitation as defined in Temporary DR 2-103.

Disciplinary Rule 2-103 of the Supreme Court of Alabama states, in pertinent part, that

> A lawyer may not solicit nor cause to be solicited on his behalf professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person or by telephone.

Disciplinary Rule 1-102(A)(6) of the Supreme Court of Alabama states:

(A) A lawyer shall not:

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

STATEMENT OF THE CASE

Petitioner is an attorney admitted to practice law in Alabama and Utah. On July 7, 1987, he authorized one of his employees to send a letter (Appendix E) to the family of a deceased child, Randy Allen Carter. The letter was delivered by messenger to the funeral home along with a copy of petitioner's firm brochure (Appendix F) and a bouquet of flowers. It was typed on letterhead and stated, in its entirety:

> To the family of Randy Allen Carter:
>
> Please accept our deepest sympathy in the loss of Randy. We know that you are presently being faced with many difficult decisions; and, will soon be faced with others.
> If we may be of assistance to you in any regard, do not hesitate to contact us at 870-8000.
>
> ROBERT NORRIS & ASSOCIATES, P.C.
>
> /s/ Robert Taylor
> Robert Taylor
> Home Phone 942-7429
> /am

The messenger called in advance to make certain that no member of the Carter family would be present when these materials were delivered, and, as the Alabama Supreme Court noted, "It is undisputed that neither Norris nor any of his representatives ever made contact by telephone or in person with any members of the Carter family." (Slip Op. at page 5, Appendix A at page 22)

No charges or findings have ever been made, either by the Alabama State Bar, its Disciplinary Board, or the Alabama Supreme Court, that anything in either the letter or brochure was false, deceptive or misleading. Nor have there ever been any allegations or findings of any impropriety in sending a bouquet of flowers along with the letter and firm brochure.

On December 13, 1988, the Alabama State Bar filed formal charges against Mr. Norris. The Complaint alleged that Petitioner had violated Alabama Disciplinary Rule 2-103, which prohibits client solicitation; Disciplinary Rule 1-102(A)(6), which states that a lawyer may not engage in "any other conduct that adversely reflects on his fitness to practice law"; and Disciplinary Rule 2-102(B) which required Mr. Norris to send a copy of his brochure to the State Bar three days after he sent it to the Carter family. Pertinent portions of the Complaint are set out in Appendix G.

Petitioner admitted the facts alleged in the Complaint but argued in his answer that they did not constitute unethical conduct. He also asserted that sending the letter and brochure was constitutionally protected.[1] (R.P. 52)

On May 24, 1990, the case was submitted to a three member disciplinary panel on the admitted facts and Petitioner's uncontradicted testimony that he inadvertently sent the brochure to the State Bar a few days late. Also on May 24th, the panel found that the facts alleged in the Complaint were true and that Petitioner was guilty as charged of violating DR 1-102(A)(6), DR 2-102(B), and DR 2-103. This was Petitioner's only conviction for professional misconduct.

At the sentencing hearing, Bar Counsel admitted that the case did not involve any aggravating circumstances.

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[1]Petitioner does not claim that his failure to timely file a copy of his brochure with the Alabama State Bar is constitutionally protected. If, however, his convictions on the other charges are set aside, on remand the Supreme Court of Alabama would have to consider what punishment, if any, is warranted by this *de minimus* violation. See pages 12–15, ante.

Notwithstanding this admission and notwithstanding the fact that the charges did not involve any moral turpitude, dishonesty, or harm to the public, the panel suspended Petitioner for two years. Its written order did not address any of Petitioner's constitutional defenses. (Appendix B)

Petitioner moved to vacate the judgment, pursuant to Rule 59 (e) of the Alabama Rules of Civil Procedure, made applicable here by Rule 8(c) of the Alabama Rules of Disciplinary Enforcement, and raised the First Amendment and Due Process issues set forth in this petition. (R.P. 255-262) This motion was summarily denied on June 26th. (R.P. 263-264) Petitioner then filed a timely notice of appeal to the Alabama Supreme Court.

On appeal to the Alabama Supreme Court, Petitioner reiterated his Due Process and First Amendment challenges to the order of suspension. These challenges were rejected in a per curiam decision by a division of the Court consisting of the chief justice and four associate justices. (Appendix A) See Alabama Appellate Rule 16.[2]

On April 12, 1991, Mr. Norris filed a timely petition for rehearing, pursuant to Alabama Appellate Rule 40. The petition reargued the First Amendment and Due Process issues in light of the manner in which they were addressed by the Court's March 29th opinion and asked that these is-

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[2]Although the Alabama Supreme Court addressed the first three issues raised in this Petition, it refused to address issue number 4, which is Petitioner's Due Process challenge to the harshness of his punishment. The lower court simply held, in general terms, that Petitioner's two year suspension was "not error." Slip Op at pages 8-9, Appendix A at pages 24-25. Nonetheless, because Petitioner raised this Due Process issue at the earliest possible opportunity after the Disciplinary Board ordered the suspension, i.e., in his Motion to Vacate (R.P. 260-261) and reiterated it in both his Opening Brief at pages 29-32 and in his Application for Rehearing to the Supreme Court of Alabama at pages 16-19, it was sufficiently raised below to confer jurisdiction on this Court to consider it. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973); *Street v. New York*, 394 U.S. 576, 581-585 (1969). See Appendix H for relevant portions of the Petitioner's Motion to Vacate, Opening Brief, and Application for Rehearing.

sues be reconsidered. Rehearing was denied without opinion by the same justices who had joined the March 29th opinion. (Appendix C) A motion to stay the order of suspension was denied, and on August 26, 1991, Petitioner was mailed an order of suspension, dated and effective as of August 22nd. (Appendix D)

REASONS FOR ISSUING THE WRIT

I

It is undisputed that Petitioner's written communication was not false, deceptive, or misleading. It is likewise undisputed that Petitioner, his messenger, and his representatives had no personal contact of any kind with the Carter family. There has been no allegation, no finding and no evidence which would support a finding, that the delivery method employed by Mr. Norris might be inherently misleading or that in Alabama's experience it was subject to abuse. Indeed, the possibility of inherent deception or potential abuse in using a messenger was not even discussed by the Alabama Supreme Court.

The core of its decision is that the *method* of delivering a written communication is the sole determinant of whether that communication is protected speech or the basis for disbarment. The truth or falsity of a written communication, the presence or absence of personal contact with the recipient or the presence or absence of evidence that the particular method of delivery might pose some danger to the public, are all constitutionally irrelevant.

The Court found

> . . . no authority in the "direct mail" cases Norris cites to support his constitutional claims. The facts of this case do not concern "direct mail" or even the "mail" at all. Rather, this case is concerned with other conduct undertaken in an effort to reach a prospective client.

Slip op. at pages 4–5, Appendix A at page 22.

This holding means that if Petitioner had been percipi-

ent enough to mail his letter and brochure to the Carter Family, he would never have been prosecuted. Cf. *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

It also means that delivery by United States mail is the only constitutionally protected method for Alabama lawyers to distribute targeted advertising materials to potential clients. Delivery by private messengers, by door to door pamphleteers, by placing handbills on automobile windshields, by private delivery or private mail services such as Federal Express, United Parcel Service, or any of their numerous national, state, and local competitors, by facsimile transmission, or by any other means, are all banned in Alabama. They are banned solely because they are not the U.S. Mail, even if they involve no personal contact with the client, even if the communication is entirely truthful and not misleading, and even if there is no evidence that the particular method of delivery has been or might be subject to abuse.

Such a simplistic approach to the First Amendment is utterly repugnant to every commercial speech decision handed down by this Court since *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980), where the Court announced a four-part test for determining whether commercial speech could be constitutionally prohibited:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Just as the Supreme Court of Alabama ignored the *Central Hudson* analysis in favor of a blanket prohibition on all

non-mail forms of distribution, so also did it ignore the fundamental distinction between solicitation which does not involve personal contact with the prospective client and solicitation which does. *See, Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *In re R.M.J.*, 455 U.S. 191 (1982), *Zauderer v. Office of Disciplinary Counsel*, 472 U.S. 626 (1985); *Shapero v. Kentucky Bar Association, supra*, all of which apply the *Central Hudson* test and turn in large part on whether the communication involves personal contact with the person being solicited.

II

The *only* definition of unlawful solicitation in the Alabama Code of Professional Responsibility appears in DR 2-103, where it states simply that "The term 'solicit' includes contact in person or by telephone."

Petitioner argued, and the Alabama Supreme Court agreed, that this language did not on its face proscribe truthful written communications sent by messenger rather than by mail. (Slip op. at page 7, Appendix A at page 23)

It nonetheless concluded that "DR 2-103 is clear as to its purpose and spirit" and that because Petitioner had "clearly violated the purpose and spirit," he was guilty of professional misconduct.[3] (Slip. Op. at page 6, Appendix A at page 23)

Petitioner was not, therefore, convicted of violating any express or implied prohibition of DR 2-103. On the contrary, he was convicted of violating the "purpose and spirit" of a penal regulation the letter of which, the Alabama Supreme Court agreed, did not proscribe his conduct.

To achieve this result, the Alabama Supreme Court had to expand the plain meaning of the rule and construe it so broadly that conduct which it did not prohibit as written in

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[3]The Court did not explain, however, what the "purpose and spirit" of the rule were or where Petitioner could have learned about them before deciding to send his letter.

1978 became illegal when it was first construed in 1991, some four years after Petitioner sent his letter to the Carter family in July of 1987.

This 1991 construction of DR 2-103 was not reasonably foreseeable when Petitioner sent his letter and brochure. Between 1978 and at least the fall of 1988, there were no ethics opinions by the Alabama State Bar, no decisions of the Alabama Supreme Court, no official comments to DR 2-103 by the Alabama Supreme Court or the Alabama State Bar and no journal articles which in any way suggested that the "purpose and spirit" of DR 2-103 would prohibit sending by messenger a writing which could lawfully be sent by mail.

An unforeseeable retroactive expansion of a penal regulation, which is made so as to bring within its proscriptions conduct which the regulation did not previously forbid, is itself forbidden by the Due Process Clause of the Fourteenth Amendment. *See, Bouie v. City of Columbia*, 378 U.S. 347, 354–355 (1964) and authorities cited therein; *Rabe v. Washington*, 405 U.S. 313 (1972); *Marks v. United States*, 430 U.S. 188 (1977).

The constitutional vice of retroactively expanding penal statutes or regulations is that the expansion deprives citizens standing in peril of life, liberty or property of fair notice about what the state commands or forbids, and forces them to speculate about the boundaries of lawful behavior. *Bouie, supra; Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

If the opinion of the Alabama Supreme Court is allowed to stand in conflict with decisions in cases such as *Bouie v. City of Columbia, supra*, no attorney in Alabama, and indeed no other Alabama citizen whose conduct displeases the executive or judicial authorities, will ever be safe. Those authorities could in every case expand rules, regulations and statutes to punish a person who was innocent under those same rules, regulations or statutes when he committed the offending behavior.

III

DR 1-102(A)(6) states that "a lawyer shall not . . . engage in any other conduct that adversely reflects on his fitness to practice law."[4]

In the Court below, Petitioner argued that there was no independent factual basis for sustaining a conviction under DR 1-102 (A)(6) and alternatively, that this rule was unconstitutionally vague.[5]

The Alabama Supreme Court responded to the former argument by purporting to quote from the Comments to Rule 8.4, Alabama Rules of Professional Conduct, which took effect on January 1, 1991. It noted that there were no Comments to DR 1-102(A)(6), but held that because "the substance" of Rule 8.4 is identical with "the substance" of DR 1-102, and that because the purpose of Rule 8.4 was "to insure a good faith effort by attorneys to abide by disciplinary rules,"[6] the purpose of DR 1-102(A)(6) was also identical. It went on to hold that

> Norris claimed at trial that he consulted the Disciplinary Rules and attempted to comply with DR 2-102 and 2-103. We can only guess that Norris consulted the Disciplinary Rules because he was unsure of the ethics of his plans. As stated earlier, Norris's actions

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[4]This provision was part of the 1969 ABA Model Code of Professional Responsibility. It was substantially modified by the 1983 ABA Model Rules of Professional Conduct. *See* Rule 8.4: "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Notwithstanding the 1983 changes, however, Alabama and at least twelve other states (Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, New York, Ohio, Tennessee, Vermont and Virginia) continue to use the original language.

[5]The Bar argued at trial that Petitioner's "overall action adversely reflects on his fitness to practice law." (R.P. Vol IV, page 219). It argued in similar generalizations on appeal.

[6]The Comments to Rule 8.4, which appear at page 1148 of West's Alabama Rules of Court (1991 edition), contain no such statement, however.

were clearly conduct that was not specifically permitted by the rules, but were actions that a literal reading of the rule would not prohibit. This conduct from an attorney shows an indifference to the purpose and spirit of the rule. This is an independent basis to support a DR 1-102(A)(6) violation.

Slip op. at pages 6–7, Appendix A at pages 23–24.

Before Petitioner's case, no Alabama decision had found that DR 1-102(A)(6) constituted an independent ground for punishing a lawyer and no Alabama case had construed or interpreted it.

Penal statutes and rules such as the Alabama Code of Professional Responsibility are essentially negative in character: they prohibit rather than permit certain specified conduct. What they fail to prohibit remains lawful. Under the Alabama Supreme Court's ruling, however, conduct which is neither "specifically permitted" nor expressly prohibited is nonetheless prohibited because it is not, in fact, permitted. A rule that broad can be arbitrarily and capriciously used to punish virtually any conduct by an attorney who is out of favor with the governmental authorities. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

No one charged with violating such a rule—not any member of the Alabama Supreme Court, not any member of the Disciplinary Board, not any Bar Counsel, and not any other member of the Alabama Bar—could beat a rap based on such a nebulous charge. *In Re Ronald S.*, 69 Cal.App.3d 866, 138 Cal.Rptr. 387, 390 (1977).

In response to Petitioner's vagueness argument, the Alabama Supreme Court construed the rule according to its own language:

> As to Norris's claim that DR 1-102(A)(6) is unconstitutionally vague on the grounds that it fails to establish any standards by which one might evaluate contemplated behavior, we disagree. . . .
>
> DR 1-102(A)(6) clearly puts attorneys on notice to exercise great discretion so as not to engage in conduct

that would adversely reflect on their fitness to practice law.

Slip op. at page 7, Appendix A at page 24.

This circular definition does nothing to help attorneys, judges, or prosecutors determine what kinds of conduct "adversely reflect" on an attorney's fitness to continue being a lawyer. By requiring attorneys to exercise "great discretion," to avoid conduct which adversely reflects on their fitness to practice law, the Court is making it plain that they must speculate at their peril about what they can and cannot do. Like normalcy, an "adverse reflection" is in the eyes of the beholder and has no objective definition.

Furthermore, if the purpose of the rule is to punish someone who does not actually violate another disciplinary rule, simply because he did not make "a good faith effort" to comply with it, it still attempts to punish undefined conduct which different attorneys, different prosecutors, and different judges could and would view differently as to its legitimacy or unlawfulness. No one can ever predict what conduct, not prohibited by the Code, will result in disbarment because it is not "specifically permitted" or because someone in power thinks the attorney is not acting in good faith.

Finally, even if DR 1-102(A)(6) was clearly defined in the Court's March 29th Opinion, its definition was not present on the face of the rule, which on July 7, 1987, did not "plainly and unmistakably" prohibit anything, *Dunn v. United States*, 442 U.S. 100,112 (1979), but which could have prohibited nearly everything. Accordingly, any new definition cannot be applied retroactively to punish Mr. Norris. *Bouie v. City of Columbia, supra*.

The issue raised by the Alabama's Supreme Court's decision is substantial because it involves the construction of a disciplinary rule used by at least thirteen states. To the extent the rule can be applied by Alabama or any of the other states which have an identical rule in the manner suggested by the Alabama Supreme Court, the Due Process ramifications should be carefully reviewed by this Court.

IV

In February of 1986, the ABA House of Delegates adopted the Standards For Imposing Lawyer Sanctions. At the time of adoption, no state had any formal guidelines for determining how severely an attorney should be punished for professional misconduct. The Preface notes that discipline for the same offense often varies widely within the same state and from state to state, and that:

> For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

Only a limited number of states have adopted these Standards. The question of whether the United States Constitution requires that the punishment of one lawyer be consistent with the punishment of other lawyers guilty of the same or similar offenses committed under the same or similar circumstances is therefore one of great significance to all members of the profession.[7] Since attorney discipline is designed in large part to protect the public and insure the integrity of the profession, consistency is also a matter of great importance to the public.

Under the Alabama system which governs Petitioner's case, and under the systems in effect in many other jurisdictions, there are simply no formal guidelines for imposing discipline. Discipline can and does vary greatly, and can be imposed because of popularity, politics, public pressure,

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[7]And indeed, to all licensed professionals.

whim, or any number of other factors which taint the entire process with unpredictability and unfairness.

This was true in the case at bar.

In both his Opening Brief and his Petition for Rehearing in the Alabama Supreme Court, Petitioner discussed the punishment given to other attorneys for specific misconduct and compared their punishments (all private reprimands) and their conduct with his. Two of the attorneys who received private reprimands were found guilty of paying non-lawyers to solicit clients for them. Others were guilty of misusing client funds, being drunk in court, willful neglect of client matters, and similar egregious misconduct.

Some of these cases are summarized below:

ASB No. 85-541(B) (lawyer given private reprimand for paying a non-lawyer to solicit business); ASB No. 89-53 (private reprimand for lawyer who appeared in court while drunk); ASB No. 89-58 (private reprimand for lawyer who ignored "repeated requests" from client for copy of transcript and who ignored "repeated requests from the State Bar for a response to the client's grievance"); ASB No. 88-31 (private reprimand for "willful" neglect and "intentional" failure to seek a client's lawful objectives); ASB No. 89-55 (private reprimand for settling case without client's knowledge or consent);[8] ASB No. 89-500 (private reprimand for bouncing a trust account check after receipt of client funds to write it, and for having an illegal interest-bearing NOW trust account); ASB No. 88-781 (private reprimand for representing former husband in domestic matter after having previously represented the former wife in the same matter); ASB No. 89-443 (same); ASB No. 85-541(A) (private reprimand for paying a non-lawyer to solicit clients);[9] ASB Nos. 88-254 and 88-661 (private reprimand

[8]ASB Nos. 85-541(B), 89-53, 89-58, 89-31 and 89-51 are reported in the January, 1990 issue of *The Alabama Lawyer* at pages 54–55.

[9]ASB Nos. 89-500, 88-781, 89-443, and 85-541(A) are reported in the March, 1990 issue of *The Alabama Lawyer*, at pages 122–123.

for failing to appear on client's behalf for Social Security hearing); ASB No. 88-173 (private reprimand for willful neglect of client's case and misrepresentation about completion date on paperwork to close estate); ASB No. 89-117 (private reprimand for willful neglect in failing to appear on client's behalf in court, with result that case was dismissed);[10] ASB No. 88-647 (private reprimand for willful neglect for failing to file responsive pleading to complaint, in allowing default to be taken, and failing to communicate with clients about default for over 18 months); ASB No. 87-294 (private reprimand for assaulting opposing party outside courtroom during a recess); ASB No. 85-653 (seven private reprimands for failure to maintain a trust account, depositing client funds in unprotected account, failure to keep accurate accounts of client funds, failure to notify clients of receipt of their money, misappropriation of client funds by using them for his own purposes, conduct involving fraud, dishonesty and deceit); ASB No. 88-604 (private reprimand for threatening client with disclosure of confidential information to force payment of fee for work of substandard quality.)[11]

Petitioner's conduct did not involve moral turpitude, dishonesty, false dealing, or coercive or overreaching behavior, and the Bar admits that there were no aggravating circumstances present. This case is the only one in which he has been found guilty of professional misconduct. He nonetheless lost his license for two years while other Alabama lawyers, guilty of much more serious misconduct, but in less publicly notorious cases, received private reprimands.

In criminal cases this Court has held that the Due Process clause is offended when the punishment is grossly disappropriate to the offense or when it is significantly harsher than that meted out to the other persons guilty of

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[10]ASB Nos. 88-254, 88-661, 88-173, and 89-117 are reported in the May, 1990 issue of *The Alabama Lawyer* at pages 190–191.

[11]ASB Nos. 88-647, 87-294, 85-653, and 88-604 are reported in the November, 1989 issue of *The Alabama Lawyer* at pages 343–344.

the same offense. *Solem v. Helm*, 463 U.S. 277 (1983). To protect both the public and the profession, it should adopt a similar rule in cases involving professional misconduct.

CONCLUSIONS

For the reasons set forth above, the Court should issue a writ of certiorari to the Supreme Court of Alabama to review its decision in the instant case.

Respectfully submitted,

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September 18, 1991

APPENDIX A

Judgment and Opinion of the
Supreme Court of Alabama, Dated March 29, 1991

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

89-1463

Robert McKim Norris, Jr.
v.
Alabama State Bar

Appeal from the Disciplinary Board
of the Alabama Bar
(ASB-87-424)

PER CURIAM.

This case involves an action brought by the Disciplinary Board of the Alabama State Bar against Robert McKim Norris, Jr., alleging violations of DR 1-102(A)(6), 2-102(B), and 2-103 of the Alabama Code of Professional Responsibility.[1] The case was heard on May 24, 1990, and the Disciplinary Board found Norris guilty of all three charges. Following the introduction of evidence as to the appropriate discipline, the Disciplinary Board imposed a two-year suspension from the practice of law. Norris appeals.

The facts in this case stem out of a tragic incident that occurred in the Birmingham area during the summer of 1987. Randy Allen Carter, 19 months old, died after being left for over 6 hours in the summer heat in a van operated by a day care center. Within a day or two after the incident,

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[1]Norris's appeal concerns complaint ASB-87-424. However, we note that the Disciplinary Board entertained three other complaints against Norris, ASB 86-409, 86-561(A), and 88-209. ASB 88-209 was disposed of by way of a summary judgment in favor of Norris. Norris was found not guilty by the Disciplinary Board of the charges contained in ASB 86-409 and 86-561(A).

Norris claims, his law office received a telephone call from an anonymous female who claimed that she personally knew the Carter family and that out of concern for them, she urged that Norris's firm help the Carter family. She sated that the family was "broke" and "didn't even have enough money to buy flowers for (Randy's) funeral." Robert Taylor, a nonlawyer representative of the firm, explained to the caller that absent a request from the Carters for the firm's services, the firm could do nothing more than "make sure they (the Carters) get a pot of flowers."

Because of the high profile of the case, Taylor met with Norris to discuss the call. They decided to have a flower wreath delivered to the funeral home where the ceremonies for Randy Carter were to take place and to attach to that wreath a letter. Taylor prepared the following letter and gave it to Norris for his approval:

> "To the family of Randy Allen Carter:
>
> "Please accept our deepest sympathy in the loss of Randy. We know that you are presently being faced with many difficult decisions; and, will soon be faced with others.
>
> "If we may be of assistance to you in any regard, do not hesitate to contact us at 870-8000.
>
> "ROBERT NORRIS & ASSOCIATES, P.C."

The letter was signed by Taylor and his home telephone number was provided. Norris claims he then reviewed the Disciplinary Rules to ensure that he was acting within the boundaries of the rules. Norris read the letter, gave his approval, folded the letter, placed it in the envelope, together with a copy of a brochure describing his firm's services, sealed the envelope, handed it to Robert Watts, another nonlawyer employee, and instructed him to attach the letter to the wreath and to deliver both to the funeral home. Watts delivered the items as requested and, upon returning,

he reported that none of the Carter family members was present at the funeral home when he delivered the items.

After news media reports surfaced concerning Norris's gesture, the Birmingham Bar Association's Grievance Committee began an investigation, which ultimately led to a complaint being filed with the Alabama State Bar against Norris. Approximately four or five days after Norris had sent the letter with the brochure to the Carters, he submitted a copy of the brochure to the Alabama State Bar for approval pursuant to DR 2-102(B).

I.

Initially, we point out the applicable standard of review in disciplinary proceedings:

> " 'Under the present rules of disciplinary enforcement, where the members of the Disciplinary Board hear the evidence and observe the demeanor of the witnesses, the Supreme Court, on review, will presume that the Board's decision on the facts is correct; and the disciplinary order will be affirmed unless the decision on the facts is unsupported by clear and convincing evidence, or the order misapplies the law to the facts.'
>
> "*Hayes v. Alabama State Bar*, 447 So.2d 675, 677 (Ala. 1984; *Trammell v. Disciplinary Board of the Alabama State Bar*, 431 So.2d 1168, 1172 (Ala. 1983)."

Courtney v. Alabama State Bar, 492 So.2d 1002, 1003 (Ala. 1986).

Norris first contends that the Disciplinary Board has acted unconstitutionally in interpreting DR 2-103 to allow it to punish him for conduct that he says the Bar has previously and "repeatedly approved in published ethics opinions." Norris cites a number of ethics opinions released by the Bar approving of solicitation by Alabama licensed attorneys to prospective clients by way of "direct mail." See

Rule 7.2, Alabama Rules of Professional Conduct.[2] Norris concedes that the Bar has not approved "in-person" solicitation by an attorney to prospective clients, but he claims that he has not engaged in any "in-person" solicitation.

We find no authority in the "direct mail" cases Norris cites so support his constitutional claims. The facts in this case do not concern "direct mail" or even the "mail" at all. Rather, this case is concerned with other conduct undertaken in an effort to reach a prospective client.

DR 2-103 reads as follows:

> "A lawyer may not solicit nor cause to be solicited on his behalf professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person or by telephone."

It is undisputed that neither Norris nor any of his representatives ever made contact by telephone or in-person with any of the members of the Carter family. Norris contends that because there was no such contact, he cannot be found to have violated DR 2-103. However, the broad language of DR 2-103 is not limited to only those two forms of solicitation. The listing of those two forms of solicitation was not intended to be exhaustive but, rather, was intended to specify two particular types of conduct.

> "Whether this is intended to suggest that other types of conduct, such as written communication, may not be treated as 'solicitation' is not clear from the language. However, . . . the provision perhaps should be read in connection with Alabama [Rules of Professional Conduct] Rule 7.2[a], which states that an attorney may advertise by 'written communication not involving solicitation.' Read in this context, Rule 7.3 might be interpreted to mean that solicitation, as de-

---

[2]Although Rule 7.2, which replaced DR 2-102, did not go into effect until January 1, 1991, the substance of the two rules is identical.

fined, also 'includes' communication in writing, provided the writing is distributed in person."

R. Thigpen, *Alabama Moves To "New Rules" Adoption*, 40 Ala.L.Rev. 80-81, n. 622 (1988).[3] We acknowledge that a better practice might have been to use the phrase "includes, but without limitation," instead of simply the term "includes." Nonetheless, DR 2-103 is clear as to its purpose and spirit, and Norris clearly violated the purpose and spirit of the rule.

II.

Norris also contends that there was no independent factual basis for his conviction under DR 1-102(A)(6) and that this provision is unconstitutionally vague. DR 1-102(A)(6) reads as follows:

"A lawyer shall not:

". . . .

"(6) engage in any other conduct that adversely reflects on his fitness to practice law."

The purpose of this subpart 6 is to ensure a good faith effort by attorneys to abide by the disciplinary rules. Comments, Rule 8.4, Alabama Rules of Professional Conduct.[4] Norris claimed at trial that he consulted the Disciplinary Rules and attempted to comply with DR 2-102 and 2-103. We can only guess that Norris consulted the Disciplinary Rules because he was unsure of the ethics of his plans. As stated earlier, Norris's actions were clearly conduct that was not specifically permitted by the rules, but were actions that a literal reading of the rule would not prohibit. This conduct from an attorney shows an indifference to the

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[3]Again, although Rules 7.2 and 7.3, Alabama Rules of Professional Conduct, which replaced DR 2-102 and DR 2-103, respectively, did not go into effect until January 1, 1991, the substance of those two rules is identical to that of DR 2-102 and DR 2-103.

[4]There were no Comments to DR 1-102(A)(6). However, Rule 8.4 which replaced DR 1-102(A)(6), is identical to DR 1-102(A)(6).

purpose and spirit of the rule. This is an independent basis to support a DR 1-102(A)(6) violation.

As to Norris's claim that DR 1-102(A)(6) is unconstitutionally vague on the grounds that it fails to establish any standards by which one might evaluate contemplated behavior, we disagree. In *Dowling v. Alabama State Bar*, 539 So.2d 149 (Ala. 1988), *cert. denied*, 490 U.S. 1081 (1989), this Court addressed a challenge to DR 2-101(A) and DR 1-102(A)(4) as being vague and overbroad and we held that those rules were written precisely enough that the attorney in that case knew or should have known that his conduct was prohibited. In determining whether a statute is unconstitutionally vague, a court must not consider it in isolation and abstraction; instead, the constitutional standard for vagueness is the practical criterion of fair notice to those to whom the statute is directed. *Rathle v. Grote*, 584 F.Supp. 1128 (M.D. Ala. 1984).

DR 1-102(A)(6) clearly puts attorneys on notice to exercise great discretion so as not to engage in conduct that would adversely reflect on their fitness to practice law.

III.

Norris finally contends that his two-year suspension was "too harsh" a punishment for a "de minimus violation of DR 2-102(B)." Although Norris failed to timely submit to the Bar the brochure explaining the services of his firm, a violation for which he was cited, he does not challenge on appeal the Disciplinary Board's decision as to his guilt. However, Norris does challenge the punishment he received for violating DR 2-102(B), which we now address.

When a member of the Bar is found guilty by the Disciplinary Board, it may impose punishment in one of the following ways: disbarment, suspension, public censure, private reprimand, or a private informal admonition. Rule 3, Alabama Rules of Disciplinary Enforcement. On appeal, this Court may affirm the Disciplinary Board's order regarding punishment or it may modify the order if necessary. *Courtner v. Alabama State Bar*, supra; *Perloff v. Disci-*

plinary Board of the Alabama State Bar, 424 So.2d 1305 (Ala. 1982).

There is undisputed evidence that Norris knew his conduct bordered on what is permissible and what is prohibited by the Bar. Norris admitted that he failed to timely submit the brochure describing his firm's services for the Bar's approval. Norris admitted that his sending flowers and letter were wrong and said that he would not "do it" again. In light of these facts, we find there is sufficient evidence that Norris's acts and omissions constituted violations of DR 1-102(A)(6), 2-102(B), and 2-103. Thus, the decision of the Disciplinary Board to impose a two-year suspension was not error.

Based on the foregoing, the decision of the Disciplinary Board is due to be, and it is hereby, affirmed.

AFFIRMED.

Hornsby, C. J., and Almon, Adams, Steagall, and Ingram, JJ., concur.

APPENDIX B

Order of the Disciplinary Board of the
Alabama State Board, Dated May 24, 1990

Before the Disciplinary Board of the

ALABAMA STATE BAR

In the Matter of	)	
	)	
ROBERT MCKIM NORRIS	)	Case No. 87-424
	)	
An Attorney At Law	)	
	)	

FINDINGS AND ORDER OF SUSPENSION

The Disciplinary Board having held the final hearing in this matter this date, as scheduled, and having heard and considered all of the evidence presented by the State Bar, as well as all of the evidence presented by and on behalf of the respondent attorney, the Disciplinary Board finds the facts to be as alleged in Charge I, and finds the respondent attorney, Robert McKim Norris, GUILTY of Charge I, Charge II, and Charge II (sic), and it is

ORDERED that the respondent attorney, Robert McKim Norris, be suspended from the practice of law in the State of Alabama for a period of two (2) years for having violated Disciplinary Rule 1-102(A)(6), as set out in Charge I, Temporary Disciplinary Rule 2-102(B), as set out in Charge II, and Temporary Disciplinary Rule 2-103, as set out in Charge III.

DONE this the 24th day of May, 1990.

/s/ Robert M. Hill, Jr.
Robert M. Hill, Jr., Chairman
Disciplinary Board, Panel III
Alabama State Bar
215 W. Alabama Street
Florence, Alabama 35630

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney, Robert McKim Norris, #10 Old Montgomery Highway, Birmingham, AL 35209, and his counsel, Clarence L. McDorman, Jr., Attorney at Law, 2700 Southtrust Tower, 420 North 20th Street, Birmingham, AL 35203-3283, and J. Anthony McLain, Assistant General Counsel, 1019 South Perry Street, Montgomery, Alabama, 36104, by United States mail, postage prepaid, on this 4th day of June, 1990.

/s/ Robert M. Hill, Jr.

Robert M. Hill, Jr., Chairman
Disciplinary Board, Panel III
Alabama State Bar

APPENDIX C

Order of the Supreme Court of Alabama
Dated June 21, 1991, Denying the
Petition for Rehearing

445 Dexter Avenue
Montgomery, AL 36130

Telephone: 242-4609

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: 89- 1463

Robert McKim Norris, Jr. (Appellant) vs. Alabama State Bar (Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell_____ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed
_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
XXX Application for rehearing overruled. No opinion written on rehearing. Per curiam-Hornsby, CJ., Almon, Adams, Stegall & Ingram, JJ. concur.
_____ Permission to file amicus curiae briefs granted

6/21/91
bsa

/s/ Robert G. Esdale
Robert S. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

August 22, 1991, Order Suspending Petitioner from the Practice of Law

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

In The Supreme Court of Alabama

August 22, 1991

In the Matter of	) Disciplinary Commission of
Robert McKim Norris, Jr.,	) The Alabama State Bar,
Attorney at Law	) ASB 87-424

ORDER

IT IS ORDERED by the Supreme Court of Alabama, that Robert McKim Norris, Jr., be and he is hereby, suspended from the practice of law in the State of Alabama for a period of two (2) years, said suspension to become effective on August 22, 1991.

Hornsby, C.J., and Maddox, Almon, Adams, Houston, Steagall, and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.
Witness my hand this 23rd day of Aug 1991.
/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX E

Letter from Robert Taylor to the Family
of Randy Allen Carter, Dated July 7, 1987

LAW OFFICES

ROBERT NORRIS & ASSOCIATES, P.C.

TRIAL PRACTICE
PERSONAL INJURY
ACCIDENTAL DEATH
WORKMENS COMPENSATION
BUSINESS AND CONSUMER FRAUD

LAKESHORE PARK
2204 LAKESHORE DRIVE
WEST LOBBY-SUITE 106
BIRMINGHAM, ALABAMA 35208
TELEPHONE (205) 870-8000

July 7, 1987

To the family of Randy Allen Carter:

Please accept our deepest sympathy in the loss of Randy. We know that you are presently being faced with many difficult decisions; and, will soon be faced with others.

If we may be of assistance to you in any regard, do not hesitate to contact us at 870-8000.

ROBERT NORRIS & ASSOCIATES, P.C.

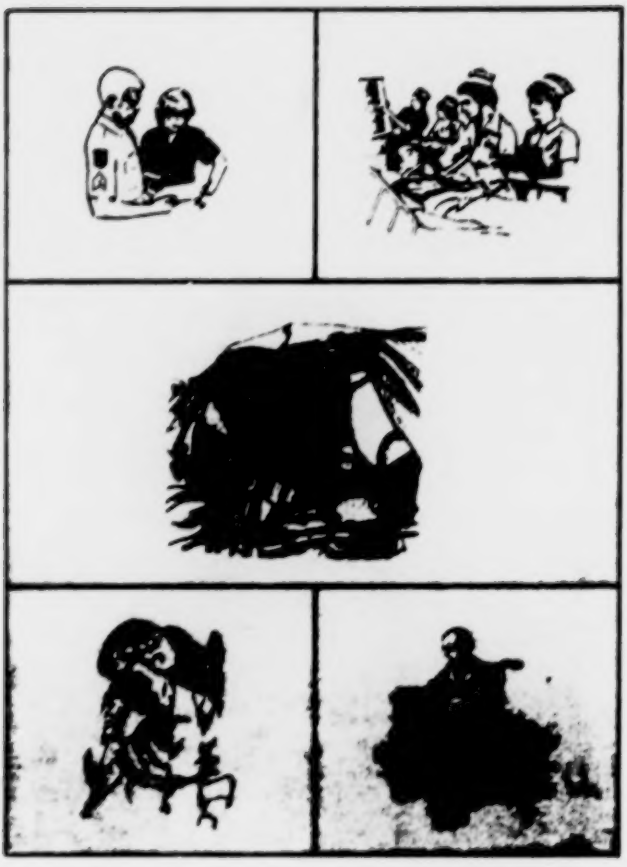
/s/ Robert Taylor
Robert Taylor

Home Phone 942-7429
/am

APPENDIX F

Brochure Accompanying the July 7, 1987 Letter
to the Family of Randy Allen Carter

We don't have to tell you that life isn't always fair ... only what to do when it's not.



Dear Friend,

It doesn't matter if it is an auto wreck, on-the-job injury, or other accident, when you've been injured your life changes . . . usually for the worse.

Health and vitality may never come again. The Law says the only real compensation an accident victim can receive is MONEY DAMAGES. Fortunately, the party at fault often carries insurance to pay for such accidents. Unfortunately, Insurance Companies try to pay as little as possible to injured victims. Claims Adjusters are experienced and may seem to be on your side, but their job is to save money for their company by paying you less.

The Law is more complex than ever. Injured victims need an Experienced Personal Injury Lawyer working to protect their rights against these powerful Insurance Companies. If you've been injured, you only get one chance to get every dollar you have coming.

Police Officers, Emergency Room Workers, Paramedics, "Investigators" and some "friends" may "suggest" a "good" lawyer. Often these people are secretly paid to send clients to lawyers. It is ILLEGAL and UNETHICAL for a lawyer to represent clients this way. Can you trust that kind of lawyer with your one chance?

We're happy when people recommend us, but we don't pay for cases. The decision of choosing an attorney is yours to make. I hope it doesn't happen to you. But if it does and you are injured, we'll make your one chance count. You've got my word on it.

Robert Nord

APPENDIX G

Pertinent Portions of the Alabama State Bar
Complaint Against Robert McKim Norris

Charge I

[Violation of DR 1-101(A)(6)]

1. At all times pertinent, the respondent attorney was licensed to practice law in the State of Alabama.

2. On or about July 7, 1987, the respondent attorney authorized the sending of a letter from his law offices, on his stationery, to the family of nineteen-month-old Randy Allen Carter.

3. The Carter child had apparently died after having been left in a day care center van for over six hours in the summer heat.

4. The July 7, 1987, letter from "Law offices Robert Norris and Associates, P.C.", a copy of which is attached hereto and made a part hereof as Exhibit "H", stated: "If we may be of assistance to you in any regard, do not hesitate to contact us at 870-8000."

5. Attached to the letter which was sent to the family of Randy Allen Carter was a brochure from "Law Offices of Robert Norris and Associates, P.C." A copy of said brochure is attached hereto and made a part hereof as Exhibit "I".

* * * * *

9. Pursuant to investigation by the Birmingham Bar Association Grievance Committee, the respondent attorney sent a written response to that body wherein he admitted that the wreath, letter and brochure had been sent to the Carter family with the approval and/or consent of the respondent attorney. A copy of said letter of the respondent attorney is attached hereto and made a part hereof as Exhibit "L".

10. The respondent attorney had not forwarded the abovementioned firm brochure to the Alabama State Bar as required by the rules of that body.

Paragraphs 6, 7, and 8 of this charge referred to materials ordered stricken by the Disciplinary Board. (R.P. 93-97)

11. In doing the above-described acts, the respondent attorney engaged in conduct that adversely reflects on his fitness to practice law, and was, thereby, guilty of violating or failing to comply with Disciplinary Rule 1-102(A)(6), said Rule providing:

"(A) A lawyer shall not:

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Charge II

[Violation of Temporary DR 2-102(B)]

1. For Charge II, the Grievance Committee adopts all of the factual allegations of Paragraphs 1 through 10, Charge I, Complaint Three, and further alleges:

2. In doing the above-described acts, the respondent attorney failed to deliver or mail to the Office of the General Counsel of the Alabama State Bar a copy of the respondent attorney's advertisement and/or brochure, and was, thereby, guilty of violating or failing to comply with Temporary Disciplinary Rule 2-102(B), said Rule providing:

"Any lawyer who advertises concerning legal services shall comply with the following:

* * *

(B) A true copy or recording of any such advertisement shall be delivered or mailed to the Office of the General Counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated; the contemplated duration thereof and the identity of the publisher or broadcaster of such advertisement, either within the advertisement or by separate communication accompanying said advertisement, shall be stated. Also, a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content as provided hereinafter by

Temporary DR 2-102(D), for six (6) years after its dissemination."

Charge III

[Violation of Temporary DR 2-103]

1. For Charge III, the Grievance committee adopts all of the factual allegations of Paragraphs 1 through 10, Charge I, Complaint Three, and further alleges:

2. In doing the above-described acts, the respondent attorney solicited or caused to be solicited professional employment from a prospective client, and was, thereby, guilty of violating or failing to comply with Temporary Disciplinary Rule 2-103, said Rule providing:

> "A lawyer may not solicit nor cause to be solicited on his behalf professional employment from a prospective client, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person or by telephone."

APPENDIX H

Relevant Portions of Petitioner's Motion to Vacate, Opening Brief, and Application for Rehearing Filed In the Courts Below

Before the Disciplinary Board of the

ALABAMA STATE BAR

In the Matter of	)	
	)	
ROBERT MCKIM NORRIS	)	Case No. 87-424
	)	
An Attorney At Law	)	
	)	

RESPONDENT'S MOTION TO VACATE THE ORDER OF SUSPENSION

I

On May 24, 1990, the Disciplinary Board issued an Order suspending the Respondent from the practice of law for a period of two years for having violated Disciplinary Rule 1-102(A)(6), Temporary Disciplinary Rule 2-102(B), and Temporary Disciplinary Rule 2-103. These violations are set forth in Charges I, II, andIII.

The Order was served on Respondent by mail on June 4, 1990.

Pursuant to Rule 59(e) of the Alabama Rules of Civil Procedure, made applicable to this proceeding by Rule 8(e) of the Alabama Rules of Disciplinary Enforcement, Respondent moves the Board to vacate the Order for a two year suspension and to impose a penalty no more severe than a private reprimand.

* * * * *

VII

The only remaining Charge against the Respondent is that he violated Disciplinary Rule 2-102(B), which requires him to file with the State Bar of Alabama a copy of any advertisement within three days after it is first disseminated.

The evidence in this case shows that Respondent did not file the advertisement at issue in this case within three days, but that it was filed within seven days. Respondent thus missed the deadline by four days. The record also contains evidence which shows that this four day delay was inadvertent.

A four day delay in filing a copy of any advertisement is insufficient to support discipline any more serious than a private reprimand because the violation is *de minimus*. No client has been harmed by the violation, Respondent corrected the violation on his own accord, without being asked to do so by the State Bar or any other entity, and the violation was at most inadvertent.

Any discipline in excess of a private reprimand for Respondent's violation of Disciplinary Rule 2-102(B) would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, in that no other attorney in Alabama has ever received a more severe penalty for a *de minimus* violation. *See, generally, Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), which discusses the Fourteenth Amendment principles involved. *Accord*: *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 798 (1975) (rehearing denied).
(R.P. Vol IV, p. 260-261)

IN THE SUPREME COURT OF ALABAMA
CASE NO. 89-1463

ROBERT MCKIM NORRIS,	)	
	)	
Appellant,	)	On Appeal From the Order
	)	of Suspension of The
vs.	)	Disciplinary Board Of
	)	The Alabama State Bar,
THE ALABAMA STATE BAR,	)	Case No. 89-424
	)	
Appellee.	)	

OPENING BRIEF OF THE APPELLANT

The Bar has the burden of proving by clear and convincing evidence that Mr. Norris' punishment is appropriate to his offense. *Worley v. Disciplinary Board of the Alabama State Bar*, 407 So.2d 823 (Ala. 1981). Punishment which is grossly disproportionate to the offense, or which is significantly harsher than that meted out to other offenders violates the Due Process Clause. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 570 L.Ed.2d 522 (1978).

As set forth above, the charges of solicitation and conduct adversely reflecting upon Mr. Norris' ability to practice law must be vacated. This leaves only the charge that he violated DR 2-102 (B). This rule states in pertinent part that whenever a lawyer advertises,

* * * * *

It is undisputed that Mr. Norris was "four days late" in complying with this rule, that his tardiness was "inadvertent," and that he thought the brochure had been filed with the State Bar *before* he sent it to the Carter family. (R.P. Vol. III, pages 196-198).

The Bar neither alleged nor proved that any harm was done by the delay or that the contents of the brochure were in violation of any other disciplinary rule.

Mr. Norris' violation, then, which is his first, is a *de minimus* one which did not involve moral turpitude, dishonesty, false dealing, or coercive or overreaching behavior and which the Bar admits did not involve any aggravating circumstances. (R.P. Vol. IV, page 224) As such, it does not warrant discipline of any kind. *See In re Synder*, 472 U.S. 634, 646-647, 105 S.Ct. 2875, 2882, 86 L.Ed.2d 504 (1985), in which the Supreme Court held that a single instance of unlawyerlike "rudeness or lack of professional courtesy" did not warrant either professional discipline or a suspension by the United States Court of Appeals for the Eighth Circuit.

The imposition of no discipline is also appropriate when Mr. Norris' *de minimus* conduct is compared with the penalties imposed upon other Alabama attorneys during the last seven years, and particularly with those cases in which private reprimands were imposed for a substantive rather than formalistic violation of the rules. (Opening Brief of Robert McKim Norris, pages 29-31).

IN THE SUPREME COURT OF ALABAMA
CASE NO. 89-1463

ROBERT MCKIM NORRIS,	)	
	)	
Appellant,	)	On Appeal From the Order
	)	of Suspension of The
vs.	)	Disciplinary Board Of
	)	The Alabama State Bar,
THE ALABAMA STATE BAR,	)	Case No. 89-424
	)	
Appellee.	)	

COMBINED APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION

I

Pursuant to Alabama Appellate Rule 40, Robert McKim Norris moves for rehearing of his appeal.

The Court handed down its judgment and opinion on March 29, 1991, and affirmed the decision of the Disciplinary Board of the Alabama State Bar in all respects. The judgment and opinion were therefore adverse to Mr. Norris.

This application is timely filed by Express Mail on Friday, April 12, 1991, pursuant to Appellate Rule 25(a).

The grounds for rehearing are set forth below:

* * * * *

4. Although the Court discusses Mr. Norris' punishment in generalized terms, it does not address the fact that his punishment is vastly more severe than that received by other attorneys who have committed similar or equivalent acts.

This disparity raises significant Due Process questions which the Court should address on rehearing.

* * * * *

Punishment which is grossly disproportionate to the offense, or which is significantly harsher than that meted out to other offenders violates the Due Process Clause. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). That is clearly and unquestionably true in the case at bar.

The Court ignored this Due Process issue on proportionality and spoke instead about the general rules governing punishment. On rehearing, the issue should be squarely addressed so that the Bar, the public, and Mr. Norris will understand the Court's reasons for allowing or forbidding the grossly disproportionate punishment of one attorney. (Application for Rehearing, at pages 1, 3, 19)

No. 91-451

IN THE

Supreme Court of the United States

October Term 1991

ROBERT MCKIM NORRIS, JR.,

Petitioner,

v.

THE ALABAMA STATE BAR

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

Ralph Ogden
Attorney for the Petitioner

Wilcox, Ogden & Cox, P.C.
1306 Chancery Building
1120 Lincoln Street
Denver, Colorado 80203
303-861-5501

October 28, 1991

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney who sends, by messenger rather than by mail, a truthful, non-deceptive and non-misleading written communication to a prospective client, can be disciplined for doing so without violating his First Amendment right to free commercial speech, even though neither the attorney, his messenger, nor any other representative ever had any personal contact with the recipient of the written communication.

2. Whether the Alabama Supreme Court violated Petitioner's right to fair notice of prohibited conduct when it acknowledged that Disciplinary Rule 2-103 did not on its face prohibit the conduct with which Petitioner was charged but nonetheless suspended Petitioner's license to practice law because it found that he had violated the "purpose and spirit" of the rule while announcing that purpose and spirit for the first time in the case at bar.

3. Whether Alabama Disciplinary Rule 1-102(A)(6), which prohibits "any other conduct which adversely reflects on his (an attorney's fitness to practice law," is so vague as to deprive Petitioner of his Due Process right to fair notice of what it actually forbids.

4. Whether the Due Process Clause of the Fourteenth Amendment requires that the discipline imposed on one attorney be approximately proportional to the discipline imposed on other attorneys in the same jurisdiction for the same or similar offenses committed under the same or similar circumstances.

TABLE OF AUTHORITIES

Cases

Rules of Court

IN THE

Supreme Court of the United States

October Term 1991

No. 91-451

ROBERT McKIM NORRIS, JR.,

Petitioner,

v.

THE ALABAMA STATE BAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

In Issue No. 3, Petitioner raises a Due Process challenge to the vagueness of Alabama Disciplinary Rule 1-102(A)(6).

As noted in the Petition for Certiorari,[1] New York has an identical rule. The constitutionality of that rule is now being challenged in a petition for a writ of certiorari to the Court of Appeals of New York. *See Elizabeth Holtzman v. Grievance Committee for the Tenth Judicial District*, No. 91-401, filed on September 9, 1991. The *Holtzman* petition is scheduled for decision on November 1, 1991.

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[1] *See* page 10, footnote 4.

Holtzman and the case at bar each raise the same vagueness challenge to DR1-102(A)(6). Both cases involve a regulation prohibiting either speech or conduct which "adversely reflects" on one's fitness to practice law and in both cases the lower courts used that rule to punish unpopular speech. Finally, both cases are governed by *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (June 27, 1991).[2]

In *Gentile*, the Court struck a Nevada disciplinary rule on vagueness grounds, noting in Part III of Justice Kennedy's opinion that:

> [T]he right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

So, too, in the case at bar. Like beauty and normalcy, adverse reflections are in the eye of the beholder.[3] These reflections have no "settled usage or tradition of interpretation in law." *Id.*

---

[2]The case at bar was decided before *Gentile* was handed down. The Alabama Supreme Court issued its opinion on March 29, 1991, and denied rehearing on June 21, 1991. Although *Holtzman* was decided four days after *Gentile*, the timing was so close that the New York Court of Appeals had no opportunity to consider it.

[3]For example, before this Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350(1977), the prevailing opinion among lawyers, reflected in the ABA Model Code of Professional Responsibility adopted by all fifty states, was that advertising by lawyers "adversely reflected" upon their fitness to practice law and was therefore subject to punishment.

There are no cases, in Alabama or elsewhere, which provide Petitioner or any other lawyer with the slightest clue as to what speech or what conduct will, in the eyes of officialdom, "adversely reflect upon his fitness to practice law." Each case of "adverse reflection" thus becomes one of first impression for the accused, the disciplinary prosecutor, the disciplinary board and the reviewing court.

Such imprecise regulations raise a very "real possibility" of discriminatory enforcement. *Id.* at 111 S.Ct. 2732. This possibility alone is sufficient to strike a regulation on vagueness grounds because, at least in First Amendment cases, it forces attorneys who wish to continue practicing law to engage in massive self-censorship.

To please disciplinary officials and avoid the agony and risk of a disciplinary trial, most attorneys will steer well away from controversy. Indeed, this is precisely what the Supreme Court of Alabama intended when it stated that "DR-102(A)(6) clearly puts an attorney on notice to ***exercise great discretion*** so as not to engage in conduct that would adversely reflect on his fitness to practice law." (Slip. Op. at P.7, App. A at page 24) (emphasis added).

Requiring attorneys to exercise "great discretion" in speech and conduct is a constitutional vice because it freezes thought, speech, and action and forces attorneys into officially approved molds, to the immense detriment of their clients and society at large. *Gentile*, at 111 S.Ct. 2732.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, the Court should issue a writ of certiorari to the Supreme Court of Alabama to review its decision in the instant case.

Respectfully submitted,

Ralph Ogden
Attorney for the Petitioner

WILCOX, OGDEN & COX, P.C.
1306 Chancery Building
1120 Lincoln Street
Denver, Colorado 80203
303-861-5501

October 28, 1991